UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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LUIS VALENZUELA,

Plaintiff,

- against -

MERCER STREET HOSPITALITY, LLC, 142 MERCER STREET LLC d/b/a LURE FISH BAR, KATY DEAN, *Individually,* and DEVON WEISS, *Individually,*

Defendants.

---X

Case No.:

COMPLAINT

PLAINTIFF DEMANDS A TRIAL BY JURY

Plaintiff, LUIS VALENZUELA, by his attorneys, PHILLIPS & ASSOCIATES, Attorneys at Law, PLLC, hereby complains of Defendants, Mercer Street Hospitality LLC, 142 Mercer Street LLC, Kay Dean, and Devon Weiss, and alleges as follows:

NATURE OF THE CASE

1. Plaintiff brings claims pursuant to the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq*. ("ADA") and the New York City Human Rights Law, New York City Administrative Code § 8-107(1), *et seq.,* and seeks damages to redress the injuries Plaintiff has suffered for being subjected to unlawful discrimination based on his disability and retaliation.

JURISDICTION AND VENUE

2. Jurisdiction of this Court is proper under 42 U.S.C. § 12101 *et seq.,* and 28 U.S.C. §§ 1331 and 1343.

3. The Court has supplemental jurisdiction over the claims of Plaintiff brought under city law pursuant to 28 U.S.C. § 1367.

4. Venue is proper in this district in that the events giving rise to the instant claims

occurred within the Southern District of the State of New York. 28 U.S.C. § 1391(b).

PROCEDURAL PREREQUISITES

5. Plaintiff filed charges of discrimination upon which this Complaint is based with the Equal Employment Opportunity Commission ("EEOC").

6. Plaintiff received a Notice of Right to Sue from the EEOC on or about November 7, 2016 with respect to the herein charges of discrimination. A copy of the Notice is annexed hereto.

7. This Action is being commenced within 90 days of receipt of said Right to Sue.

PARTIES

8. Plaintiff LUIS VALENZUELA (hereinafter "VALENZUELA") is a resident of the State of New York and County of Kings.

9. Defendant MERCER STREET HOSPITALITY, LLC (hereinafter "MSH") is an active domestic limited liability company, with its principal place of business located at 134 Spring Street Suite 502, New York, NY 10012.

10. Defendant MSH owns and operates a collection of restaurants and bars, including Defendant 142 MERCER STREET LLC d/b/a LURE FISH BAR (hereinafter "LURE FISH BAR"). Defendant LURE FISH BAR's principal place of business is located at 142 Mercer Street, New York, NY 10012.

11. At all times relevant, Plaintiff VALENZUELA worked as a "Server/Captain" at LURE FISH BAR.

12. Defendant KATY DEAN (hereinafter "DEAN") is an employee of Defendants MSH and LURE FISH BAR, holding the position of "Manager."

13. At all times relevant, Defendant DEAN was Plaintiff VALENZUELA's direct supervisor and/or had supervisory authority over Plaintiff VALENZUELA. Defendant DEAN had

the ability to hire, fire and affect the terms and conditions of Plaintiff's employment.

14. Defendant DEVON WEISS (hereinafter "WEISS") is an employee of Defendants MSH and LURE FISH BAR, holding the position of "Assistant General Manager."

15. At all times relevant hereto, Defendant WEISS was Plaintiff VALENZUELA's direct supervisor and/or had supervisory authority over Plaintiff VALENZUELA. Defendant WEISS had the ability to hire, fire and affect the terms and conditions of Plaintiff's employment.

16. Defendants MSH, LURE FISH BAR, DEAN and WEISS are collectively referred to herein as "Defendants."

MATERIAL FACTS

17. On or about October 5, 2015, Plaintiff VALENZUELA began his employment with Defendants as a "Server/Captain." Plaintiff's annual salary was approximately $78,000.00.

18. Upon information and belief, Plaintiff VALENZUELA was a good employee who loved his work.

19. Plaintiff VALENZUELA suffers from anxiety, and has been diagnosed as having anxiety by medical doctors. Plaintiff is prescribed medication to help him cope with his anxiety disorder. Plaintiff's anxiety disorder manifests itself in the form of increased general anxiety as well as severe anxiety attacks.

20. On or about March 20, 2016, while working for Defendants, Plaintiff VALENZUELA had an anxiety attack that required medical attention. Since Plaintiff VALENZUELA had to leave his shift to go to a hospital, he informed his managers, Missy Neill and Defendant DEAN, that he was experiencing an anxiety attack. Ms. Neill had previously worked with Plaintiff VALENZUELA in other restaurants and recommended Plaintiff for his position with Defendant LURE FISH BAR. Ms. Neill was aware of Plaintiff's disability, as

Plaintiff had suffered anxiety attacks while working for Ms. Neill at Plaintiff's previous employers.

21. Defendant DEAN was not aware of Plaintiff' anxiety disorder until Plaintiff suffered this anxiety attack on March 20, 2016. After becoming aware of Plaintiff's anxiety disorder, Defendant DEAN changed the way that she behaved and interacted with Plaintiff.

22. Specifically, on or about April 4, 2016, Plaintiff VALENZUELA began his work shift on or around 4:00 p.m. At approximately 5:00 p.m., Plaintiff VALENZUELA noticed that the guest sommelier was not present in the pre-shift meeting. Plaintiff VALENZUELA asked Defendant DEAN if she knew whether the sommelier would come to work. Defendant DEAN responded that she did not know.

23. Ms. Neill was responsible for managing sommeliers. Therefore, at approximately 5:45 p.m., Plaintiff VALENZUELA texted Ms. Neill to inform her that the guest sommelier was not at work. While Plaintiff VALENZUELA was texting Ms. Neill, Defendant DEAN walked into the private dining room where Plaintiff was standing and immediately confiscated Plaintiff's cellphone. Plaintiff VALENZUELA asked Defendant DEAN to allow Plaintiff to place his phone in his locker. However, Defendant DEAN firmly responded, "No!" Plaintiff VALENZUELA was upset by the confiscation of his personal property. However, fearing an accusation of insubordination, Plaintiff VALENZUELA did not object or insist on keeping his cellphone.

24. At approximately 6:00 p.m., Plaintiff VALENZUELA decided to go to the private dining room to study the LURE FISH BAR's menu in preparation for an examination of servers that would take place on or about April 8, 2016. At that time, Plaintiff VALENZUELA did not yet have any tables. Soon thereafter Defendant DEAN noticed Plaintiff VALENZUELA studying and said, "See, it's a good thing I took your phone. Now you're doing something productive." Plaintiff VALENZUELA maintained a cordial exchange with Defendant DEAN, and politely

asked for the return of his cellphone. Plaintiff VALENZUELA does not lock his phone and so all the text messages that Plaintiff receives are visible on the main screen. Plaintiff VALENZUELA was not comfortable with outsiders learning about his personal life by looking at his phone. Defendant DEAN denied Plaintiff's request to return his cellphone.

25. As time passed, Plaintiff VALENZUELA felt progressively worse. Around 7:00 p.m., Plaintiff VALENZUELA's body began to feel numb. This symptom was a sign that Plaintiff was about to have an anxiety attack. Plaintiff VALENZUELA approached Defendant DEAN and asked her to watch his station, as Plaintiff needed to step off the floor momentarily due to his anxiety attack. Plaintiff VALENZUELA told Defendant DEAN that he needed to go to his locker in order to take a Xanax for his anxiety attack.

26. However, Defendant DEAN denied Plaintiff VALENZUELA's request for a reasonable accommodation of a short break to take his medication by firmly responding, "No!"

27. Plaintiff VALENZUELA asked Defendant DEAN numerous additional times if he could take a short break. However, Defendant DEAN continued to deny Plaintiff's request for a reasonable accommodation. Defendant DEAN laughed at Plaintiff and rolled her eyes when he would ask her for this accommodation.

28. As Plaintiff VALENZUELA's anxiety attack worsened, he felt that he had no choice but to step off the floor in order to take his medication. Plaintiff VALENZUELA took a break of only fifteen minutes to take his medication. After this short break, Plaintiff returned to his section. Defendant DEAN did not engage in any further communication with Plaintiff during his shift. Plaintiff VALENZUELA caught up with his tables immediately and had a very productive night, which included sales of very expensive wines. Plaintiff VALENZUELA ended up having the highest sales that night.

29. Towards the end of his shift, at approximately 9:00 p.m., Plaintiff VALENZUELA asked Defendant DEAN if he could have the telephone number for the Human Resources Department. Defendant DEAN asked Plaintiff VALENZUELA why he wanted to get the number, to which Plaintiff replied that he wanted to file a complaint against Defendant DEAN. Defendant DEAN refused to give Plaintiff VALENZUELA the number, instead stating that Plaintiff was being "dramatic."

30. At the end of his shift, Plaintiff approached Defendant DEAN again in the management office. In the presence of Chef Preston, who was also in the office, Plaintiff VALENZUELA again asked, "Ms. Dean, may I have the contact information for HR so that I may file a complaint?" Defendant DEAN rolled her eyes and reluctantly shouted out the e-mail to the Human Resources Department. Defendant DEAN then pointed to Plaintiff VALENZUELA's phone, which was on her desk, in full view and access of everyone who entered the management office. Plaintiff VALENZUELA took his phone and went home.

31. On or about April 6, 2016, Plaintiff VALENZUELA worked his lunch shift, which ended around 5:00 p.m. At approximately 7:30 p.m. Plaintiff noticed on www.hotschedules.com, the website that Defendants use for scheduling, that he was taken off the schedule. Plaintiff VALENZUELA wrote a message to his co-workers, Jorge L. Sanchez, Ana Maria Montoya, Maria Young, Eduardo Guzman, Codrin Mihaila, Claudia Janelle, Christine Gabrielle, Brandon L. Dobashi, Jason Pazmino, Julia Fernandes, and Natalia Gi and Adam Molina. Mr. Sanchez informed Plaintiff that he was "86-ed", which meant that he was terminated.

32. The next day, on or about April 7, 2016, around 3:30 p.m., Plaintiff VALENZUELA went to Defendants' corporate office. There he met with Richard Malijan, Human Resources Representative, and Mr. Malijan's colleague. When Plaintiff introduced

himself, Mr Malijan and his colleague stated that Plaintiff was the "guy they received an e-mail about." However, neither Mr. Malijan nor his colleague elaborated regarding this e-mail. Plaintiff VALENZUELA then presented the two HR employees with a formal, written complaint of discrimination against Defendant DEAN. Both Mr. Malijan and his colleague read this complaint in front of Plaintiff VALENZUELA.

33. Plaintiff VALENZUELA explained to Mr. Malijan and his colleague that Plaintiff was subjected to discrimination by Defendant DEAN due to his disability. Plaintiff VALENZUELA also requested an explanation regarding his removal from the schedule. Mr. Malijan and his colleague replied that they did not know anything about Plaintiff's "situation." Then, Mr. Malijan and his colleague promised they would investigate Plaintiff's complaint of discrimination.

34. Approximately thirty minutes later, around 4:00 p.m., Plaintiff VALENZUELA received a call from Defendant WEISS, who was an Assistant General Manager. Defendant WEISS communicated to Plaintiff that Plaintiff was being terminated for insubordination. Plaintiff VALENZUELA asked Defendant WEISS to elaborate on the basis for this allegation of insubordination. However, Defendant WEISS ignored Plaintiff VALENZUELA's question and instead stated that the management team had lost faith in Plaintiff performing the job functions required for his position. Plaintiff VALENZUELA was shocked by this statement, especially in light of the fact that the day prior to his last day of work with Defendants Plaintiff had the highest sales in the restaurant. Defendant WEISS finsihed by statin that Plaintiff VALENZUELA should return to LURE FISH BAR to pick up his belongings and last paycheck.

35. Subsequently, around 5:10 that same day, Plaintiff VALENZUELA wrote an e-mail to Mr. Malijan and Defendant WEISS thanking Mr. Malijan for meeting with him and reading

his complaint of disability discrimination against Defendant DEAN and stating that Plaintiff was "wrongfully terminated given [his]disability." Mr. Malijan responded that he would follow up with the general manager and manager for Defendant LURE FISH BAR.

36. On or about April 11, 2016, Mr. Malijan responded to Plaintiff VALENZUELA with an email that simply contained his termination letter. Plaintiff VALENZUELA asked for a letter that stated the reason for his termination. Mr. Malijan denied Plaintiff's request.

37. On or about April 16, 2016 at approximately 4:30 p.m., Plaintiff VALENZUELA went to LURE FISH BAR to pick up his last paycheck. However, when Plaintiff arrived at the restaurant, Defendant WEISS informed Plaintiff that he did not have his last paycheck and did not know where it was.

38. To date, Plaintiff VALENZUELA has not received his last paycheck.

39. Defendants failed to engage in the interactive process with Plaintiff upon learning of his disability.

40. Defendants perceived Plaintiff as being disabled.

41. Defendants discriminated against Plaintiff by refusing to provide Plaintiff with a reasonable accommodation for his disability and by terminating him due to his actual and/or perceived disability.

42. Defendants terminated Plaintiff VALENZUELA in retaliation for his complaints of disability discrimination.

43. Defendants' actions and conduct were intentional and intended to harm Plaintiff VALENZUELA.

44. As a result of Defendants' actions, Plaintiff VALENZUELA feels extremely humiliated, degraded, victimized, embarrassed, and emotionally distressed.

45. As a result of the acts and conduct complained of herein, Plaintiff VALENZUELA has suffered a loss of income, the loss of a salary, bonus, benefits, and other compensation which such employment entails, and Plaintiff has also suffered future pecuniary losses, emotional pain, suffering, inconvenience, loss of enjoyment of life, and other non-pecuniary losses.

46. Plaintiff VALENZUELA has further experienced severe emotional distress.

47. Defendants' conduct has been malicious, willful, outrageous, and conducted with full knowledge of the law. As such, Plaintiff VALENZUELA demands Punitive Damages as against Defendants.

FIRST CAUSE OF ACTION FOR DISCRIMINATION
UNDER THE AMERICANS WITH DISABILITIES ACT
(Not Against the Individual Defendants)

48. Plaintiff VALENZUELA repeats and realleges each and every paragraph above as if said paragraphs were more fully set forth herein at length.

49. Plaintiff claims Defendants violated the Americans with Disabilities Act of 1990 (Pub. L. 101-336), as amended, as these titles appear in volume 42 of the United States Code, beginning at section 12101.

50. Title 42 of the Americans with Disabilities Act of 1990, Chapter 126, Subchapter I, Section 12112, Discrimination [Section 102] states: "(a) General rule. - No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."

51. Defendants engaged in an unlawful discriminatory practice against Plaintiff because of his disability, by failing to engage in an interactive process in providing Plaintiff with a reasonable accommodation and terminating Plaintiff based on his disability.

52. As such, Plaintiff VALENZUELA has been damaged as set forth herein.

SECOND CAUSE OF ACTION FOR RETALIATION
UNDER THE AMERICANS WITH DISABILITIES ACT
(Not Against the Individual Defendants)

53. Plaintiff VALENZUELA repeats and realleges each and every paragraph above as if said paragraph was more fully set forth herein at length.

54. The ADA prohibits retaliation, interference, coercion, or intimidation.

55. 42 U.S.C. § 12203 provides:

i. Retaliation. No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

ii. Interference, coercion, or intimidation. It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

56. Defendants violated this section as set forth herein.

THIRD CAUSE OF ACTION FOR DISCRIMINATION
UNDER THE NEW YORK CITY ADMINISTRATIVE CODE

57. Plaintiff VALENZUELA repeats and realleges each and every allegation made in the above paragraphs of this Complaint as if more fully set forth herein at length.

58. The Administrative Code of City of New York § 8-107(1) provides that "It shall be an unlawful discriminatory practice: (a) For an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, **disability**, marital status, sexual orientation or alienage or citizenship status of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment."

59. Defendants violated the section cited herein.

FOURTH CAUSE OF ACTION FOR RETALIATION
UNDER THE NEW YORK CITY ADMINISTRATIVE CODE

60. Plaintiff VALENZUELA repeats and realleges each and every allegation made in the above paragraphs of this Complaint as if more fully set forth herein at length.

61. The New York City Administrative Code § 8-107(7) provides that it shall be unlawful discriminatory practice: "For an employer . . . to discriminate against any person because such person has opposed any practices forbidden under this chapter. . ."

62. Defendants engaged in an unlawful discriminatory practice in violation of New York City Administrative Code § 8-107(7) by discriminating against Plaintiff because of Plaintiff's opposition to the unlawful employment practices of Defendants.

FIFTH CAUSE OF ACTION FOR DISCRIMINATION
UNDER THE NEW YORK CITY ADMINISTRATIVE CODE
(Against Defendant Weiss)

63. Plaintiff VALENZUELA repeats and realleges each and every allegation made in the above paragraphs of this Complaint as if more fully set forth herein at length.

64. The New York City Administrative Code § 8-107(6) provides that it shall be unlawful discriminatory practice: "For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this chapter, or attempt to do so."

65. Defendant WEISS engaged in an unlawful discriminatory practice in violation of New York City Administrative Code § 8-107(6) by aiding, abetting, inciting, compelling and coercing the above discriminatory, unlawful and retaliatory conduct.

JURY DEMAND

Plaintiff VALENZUELA demands a trial by jury as to all issues triable by jury in the above-captioned civil action.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff VALENZUELA respectfully requests a judgment against the Defendants:

A. Declaring that Defendants engaged in unlawful employment practices prohibited by the Americans with Disabilities Act, and the New York City Administrative Code, § 8-107 *et seq*., in that Defendants discriminated and retaliated against Plaintiff VALENZUELA on the basis of his disability;

B. Awarding damages to Plaintiff VALENZUELA for all lost wages and benefits resulting from Defendants' unlawful discrimination and to otherwise make them whole for any losses suffered as a result of such unlawful employment practices;

C. Awarding Plaintiff VALENZUELA compensatory damages for mental, emotional and physical injury, distress, pain and suffering and injury to their reputation in an amount to be proven;

D. Awarding Plaintiff VALENZUELA punitive damages;

E. Awarding Plaintiff VALENZUELA attorneys' fees, costs, disbursements, and expenses incurred in the prosecution of the action;

F. Awarding Plaintiff VALENZUELA such other and further relief as the Court may deem equitable, just and proper to remedy the Defendant's unlawful employment practices.

Dated: New York, New York
December 15, 2016

PHILLIPS & ASSOCIATES, ATTORNEYS AT LAW, PLLC

By: ______________________

David S. Schwartz, Esq.
Dorina Cela, Esq.
Attorneys for Plaintiff
45 Broadway, Suite 620
New York, New York 10006
(212) 248-7431
dschwartz@tpglaws.com
dcela@tpglaws.com

EEOC Form 161-B (11/09)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE (ISSUED ON REQUEST)

To: Luis Valenzuela
125 Milton Street
Brooklyn, NY 11222

From: New York District Office
33 Whitehall Street
5th Floor
New York, NY 10004

☐ *On behalf of person(s) aggrieved whose identity is CONFIDENTIAL (29 CFR §1601.7(a))*

RECEIVED NOV 07 BY:

EEOC Charge No.	EEOC Representative	Telephone No.
520-2016-03288	Gustavo A. Blanco, Investigator	(212) 336-3640

(See also the additional information enclosed with this form.)

NOTICE TO THE PERSON AGGRIEVED:

Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), or the Genetic Information Nondiscrimination Act (GINA): This is your Notice of Right to Sue, issued under Title VII, the ADA or GINA based on the above-numbered charge. It has been issued at your request. Your lawsuit under Title VII, the ADA or GINA must be filed in a federal or state court WITHIN 90 DAYS of your receipt of this notice; or your right to sue based on this charge will be lost. (The time limit for filing suit based on a claim under state law may be different.)

☐ More than 180 days have passed since the filing of this charge.

☒ Less than 180 days have passed since the filing of this charge, but I have determined that it is unlikely that the EEOC will be able to complete its administrative processing within 180 days from the filing of this charge.

☒ The EEOC is terminating its processing of this charge.

☐ The EEOC will continue to process this charge.

Age Discrimination in Employment Act (ADEA): You may sue under the ADEA at any time from 60 days after the charge was filed until 90 days after you receive notice that we have completed action on the charge. In this regard, the paragraph marked below applies to your case:

☐ The EEOC is closing your case. Therefore, your lawsuit under the ADEA must be filed in federal or state court WITHIN 90 DAYS of your receipt of this Notice. Otherwise, your right to sue based on the above-numbered charge will be lost.

☐ The EEOC is continuing its handling of your ADEA case. However, if 60 days have passed since the filing of the charge, you may file suit in federal or state court under the ADEA at this time.

Equal Pay Act (EPA): You already have the right to sue under the EPA (filing an EEOC charge is not required.) EPA suits must be brought in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.

If you file suit, based on this charge, please send a copy of your court complaint to this office.

On behalf of the Commission

Kevin J. Berry, 11/1/16
Kevin J. Berry,
District Director
(Date Mailed)

Enclosures(s)

cc: Attn:
Director of Human Resources
142 MERCER STREET LLC DBA LURE FISH BAR
134 Spring Street, Suite 502
New York, NY 10012

David Schwartz, Esq.
PHILLIPS & ASSOCIATES
45 Broadway, Suite 620
New York, NY 10006

EEOC Form 161-B (11/09)

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33 Whitehall Street
5th Floor
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RECEIVED
NOV 07 2016
BY:

☐ *On behalf of person(s) aggrieved whose identity is CONFIDENTIAL (29 CFR §1601.7(a))*

EEOC Charge No.	EEOC Representative	Telephone No.
520-2016-02956	Gustavo A. Blanco, Investigator	(212) 336-3640

(See also the additional information enclosed with this form.)

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On behalf of the Commission

Kevin J. Berry (signature)

Kevin J. Berry,
District Director

11/1/16
(Date Mailed)

Enclosures(s)

cc:

Attn
Director of Human Resources
MERCER STREET HOSPITALITY
134 Spring Street, Suite 502
New York, NY 10012

David Schwartz, Esq.
PHILLIPS & ASSOCIATES
45 Broadway, Suite 620
New York, NY 10006